

# Capital Punishment Legislation in the 110<sup>th</sup> Congress: A Sketch

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## Summary

Most capital offenses are state crimes. In 1994, however, Congress revived the death penalty as a federal sentencing option. More than a few federal statutes now proscribe offenses punishable by death. A number of bills were offered during the 110<sup>th</sup> Congress to modify federal law in the area. None were enacted. One, S. 447/H.R. 6875, would have abolished the federal death penalty. Another (H.J.Res. 80) would have amended the Constitution to abolish capital punishment as a sentencing alternative for either state or federal crimes. Other proposed amendments would have eased constitutional limitations on the death penalty as a sentencing option, particularly in cases involving the rape of children (H.J.Res. 83, H.J.Res. 96). Several proposals would have increased the number of capital offenses to include one or more newly created offenses or existing non-capital offenses newly designated as capital offenses, e.g., H.R. 855, H.R. 880, H.R. 1118, H.R. 1645, H.R. 2376, H.R. 3147, H.R. 3150, H.R. 3156, S. 330, S. 607, S. 1320, S. 1348, and S. 1860. Numbered among the new capital offenses and newly designated capital offenses would have been murder related to street gang offenses or Travel Act violations, murder committed during and in relation to drug trafficking, murder committed in the course of evading border inspection, murder of disaster assistance workers or members of the armed forces, and various terrorism-related murders.

A third category of proposals would have adjusted in one way or another the procedures used to try and sentence capital defendants, including those relating to where a capital offense may be tried, the appointment of counsel in capital cases, the pre-trial notification which the parties must exchange in capital cases, the procedures that apply when the defendant claims to be mentally retarded, adjustments in the statutory aggravating and mitigating circumstances, jury matters, and the site of federal executions. Among the bills offering one or more of these proposals were: H.R. 851, H.R. 880, H.R. 1645, H.R. 1914, H.R. 3150, H.R. 3153, H.R. 3156, S. 1320, and S. 1860. This is an abridged version of CRS Report RL34163, *The Death Penalty: Capital Punishment Legislation in the 110<sup>th</sup> Congress*, by Charles Doyle.

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## **Introduction**

Existing federal law treats capital cases differently. There is no statute of limitations for capital offenses. There is a preference for the trial of capital cases in the county in which they occur. Defendants in capital cases are entitled to two attorneys, one of whom shall be learned in the law applicable to capital cases. The Attorney General must ultimately approve the decision to seek the death penalty in any given case. Defendants are entitled to notice when the prosecution intends to seek the death penalty, and at least three days before the trial, to a copy of the indictment as well as a list of the government's witnesses and names in the jury pool. Defendants have twice as many peremptory jury challenges in capital cases as in other felony cases and prosecutors more than three times as many. Should the defendant be found guilty of a capital offense, the sentencing hearing procedures set forth in chapter 228 of title 18 of the United States Code come into play. In homicide cases, the sentencing hearing involves two determinations: whether the defendant acted with the intent required and whether the weighing of pertinent aggravating and mitigating circumstances warrant imposition of the death penalty. The jury must unanimously agree that an aggravating factor has been established before the factor may be weighed in determining whether to impose the death penalty; on the other hand the finding of a single juror is sufficient for consideration of a mitigating factor. The death penalty may only be imposed if the jury unanimously finds that the aggravating factors outweigh the mitigating factors; or if the court so finds in the absence of a jury.

## **Constitutional Amendments**

The United States Constitution does not mention capital punishment or death penalty in so many words. It does, however, prohibit imposition of cruel and unusual punishments as well as the deprivation of life without due process of law. The Supreme Court recently held that the Eighth Amendment cruel and unusual punishment clause made applicable to the states through the due process clause of the Fourteenth Amendment precludes imposition of the death penalty for rape of child under twelve years of age when the victim was neither killed nor intended to be killed. Two constitutional amendments were offered at least in partial response. H.J.Res. 96 would simply have amended the Constitution to state that "The penalty of death for the forcible rape of a child who has not attained the age of 12 years does not constitute cruel and unusual punishment." H.J.Res. 83 is equally terse although seemingly more sweeping: "The death penalty is permitted under the Constitution and does not constitute cruel and usual punishment, including when the death penalty is imposed for the rape of a child under sixteen years old." H.J.Res. 80, in contrast, would have abolished capital punishment as a sentencing alternative for either state or federal crimes. The proposed amendment would have extended to both pending and subsequent capital cases.

## **Procedural Changes**

During the 110<sup>th</sup> Congress, proposals were offered that would have modified existing law relating to: (1) where a capital offense may be tried, (2) the appointment of counsel in capital cases, (3) the pre-trial notification which the parties must exchange in capital cases, (4) the procedures that apply when the defendant claims to be mentally retarded, (5) adjustments in the statutory aggravating and mitigating circumstances, (6) jury matters, and (7) the site of federal executions.

The Constitution provides that the trial of all crimes shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed, and that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of

the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. The Supreme Court held in *United States v. Rodriguez-Moreno*, that a crime may be tried wherever any of its “conduct elements” occur. Congress has provided that where possible capital cases should be tried in the county in which they occur. H.R. 3156 and S. 1860 would have dropped the language that calls for the trial of capital cases in the county in which they occur. In its place, they would have installed language that stated that if an offense or conduct related to it involves activities which affect interstate or foreign commerce, the offense may be tried in any district in which the activities occurred. The proposed amendment appeared to permit trial of an offense in a district in which related conduct affecting interstate or foreign commerce occurs even if the offense itself and each of its elements is committed entirely in another district. Such applications might appear to a reviewing court to do more than the Constitution permits.

Capital defendants are entitled to the assignment of two attorneys for their defense. There is some uncertainty over whether they are to be appointed immediately following indictment for a capital offense or whether they need only be appointed “promptly” sometime prior to trial; and whether the right expires with the decision of the government not to seek the death penalty. H.R. 851 would have amended the law so that prosecutor’s notice of an intent to seek the death penalty, rather than indictment for a capital offense, triggers the right to the appointment of second counsel.

The law now obligates the prosecutor to advise the defendant and the court, a reasonable time before trial or before the acceptance of a plea, of the government’s intention to seek the death penalty. The Fourth and Eleventh Circuits have held that a failure to provide timely notice may preclude the effort of a prosecutor to seek the death penalty. H.R. 851, H.R. 3156, and S. 1860 would have authorized a continuance in the face of a delayed notification of an intent to seek the death penalty. They would also have made it clear that a defendant may not foreclose the government’s option by pleading guilty before prosecutors have had time to seek the Attorney General’s approval to seek the death penalty. They would have balanced the prosecution’s obligation to disclose any aggravating factors upon which it intends to rely with a similar defense obligation to notify the prosecution of mitigating factors upon which it intends to rely when the prosecution seeks the death penalty. Elsewhere once the government has announced its intention to seek the death penalty, the bills would have afforded defendants the advantage of a continuance when necessary to address the additional issues raised. Here, it would have afforded the prosecution a similar benefit. Critics may question the symmetry.

## **Mental Retardation**

Neither the insanity defense nor the prohibitions against trial of the mentally incompetent necessarily preclude prosecution and conviction of the mentally retarded. Nevertheless, neither the Constitution nor federal statutory provisions allow the execution of a federal capital defendant suffering from mental retardation. The limited available case law suggests that the determination of the issue may be assigned to the court (rather than the jury) to be established by the defendant under preponderance of the evidence standard prior to trial. H.R. 851, H.R. 3156, and S. 1860 would have made several procedural adjustments to accommodate claims of mental retardation in federal capital cases. They would have given the prosecution the right to an independent mental health examination of any defendant claiming retardation and to a continuance to prepare for trial and sentencing if necessary. They would have conditioned the defendant’s presentation of evidence and argument relating to mental retardation, at least for mitigation purposes, to instances where the defendant has provided prior notification. They would have instructed the trier of fact, be it judge or jury, to consider the issue of mental retardation only if an aggravating factor has

been found, and if so, to consider the issue of mental retardation first among the mitigating factors. They would have supplied a statutory definition of mental retardation with three components: that the defendant have an IQ of 70 or less; that he have been retarded continuously since under 18 years of age; and that he has continuously possessed impaired mental functions including the ability to learn, reason, and control impulses. There may be objections, however. The definition of mental retardation might be thought too narrow to embrace all those constitutionally protected. Resolution of mental retardation issues, some would contend, should occur prior to trial as a matter of fairness and judicial economy if nothing else.

### **Aggravating and mitigating factors**

Several bills suggested adjustments in the designated aggravating and mitigating circumstances. For instance, some proposals would have amended the mitigating circumstance that now applies when “another defendant or defendants, equally culpable in the crime, will not be punished by death,” H.R. 851 and H.R. 1914. The amendment would have limited the factor to instances where the prosecution has elected not to seek the death penalty for a codefendant. In doing so it would have eliminated from coverage of instances where the defendant’s codefendant is under 18 years of age, or mentally retarded, or extradited with an agreement not to execute, or where an earlier jury has declined to sentence a codefendant to death for the same offense. The amendment might be thought to have largely symbolic impact. Section 3592(a)(8) allows a defendant to offer evidence of “any circumstance of the offense that mitigate[s] against imposition of the death penalty.” Thus, it seems that any circumstances removed from a specific statutory mitigating factor might be claimed under the catch-all provisions of section 3592(a)(8). Some commentators have suggested, however, the courts might construe removal as a limitation on the catch-all provision as well.

Most federal capital punishment statutes do not proscribe murder as such. They outlaw murder under particular circumstances, circumstances that themselves might be considered aggravating, such as the murder of a Member of Congress or a murder committed in conjunction with the rape of the victim. Section 3592(c)(1) recognizes as an aggravating factor that murder was during the course of one of a list of designated federal crimes. Several bills would have placed other offenses on the list, e.g., 18 U.S.C. 241 (conspiracy against civil rights), 245 (federal protected rights), 247 (interference with religious exercise), 37 (violence at international airports), 1512 (witness tampering), and 1513 (retaliating against a witness): H.R. 851, H.R. 3156, S. 1860. The rationale for expansion appears to be that (1) capital punishment should be reserved for the “worst of the worst;” (2) murders committed in the course of the most serious federal crimes fit that description; and (3) one or more such most serious federal crimes are not now listed. The rationale of opponents seems to be two-fold. First, as with mitigating circumstances, specific designation is less significant when the catch-all provision would allow presentation to the jury in any event. In the case of aggravating circumstances, however, expressly adding new crimes to the “murder plus” factor status is significant because the existence of a specifically designated aggravating factor is a *sine qua non* for imposition of the penalty; the mere presence of a catch-all aggravating factor is insufficient. Second, the list of death-qualifying, specifically designated aggravating factors is now so close to all-encompassing that some special justification may be in order before the list is expanded.

The creation of a new obstruction of justice aggravating factor was a common proposal, H.R. 851, H.R. 1914, H.R. 3156, S. 1860. The proposal rests on the premise that killing witnesses and other participants in the judicial process “strikes at the heart of the system of justice itself.” The objections voiced over other aggravating factor amendments may be heard again: “Run of the mill” murders are being made capital. The death penalty is no longer reserved for the worst of the

worst murderers. This is the situation the Court found unacceptable in *Furman*. Or so the argument may run.

## **Capital Juries**

In *California v. Brown*, the Supreme Court upheld a state court instruction which informed a capital jury that “they must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.” H.R. 851 would have introduced a similar directive into the federal process in capital cases. H.R. 3156 and S. 1860 would have used the same language but dropped references to “sentiment” and “sympathy, perhaps in response to criticism of an earlier version of the proposal. A number of proposals in the 110<sup>th</sup> Congress addressed problems associated with selecting and maintaining a panel of qualified jurors in capital cases. Existing law states the jury at the sentencing phase of a capital case “shall consist of 12 members, unless, at any time before the conclusion of the hearing, the parties stipulate with the approval of the court, that it shall consist of a lesser number.” H.R. 851 and H.R. 1914 would have amended the provision to permit the court to approve a lesser number for good cause, without requiring the approval of the defendant or the prosecutor. Imposition of the death penalty upon the recommendation of a jury of less than twelve members over the objection of the defendant is likely to draw criticism. Perhaps to ensure that recourse to juries of less than twelve will only be necessary in extreme cases, the two bills would have increased the number of permissible alternate jurors from six to nine and afford each side four additional peremptory challenges in the cases where more than six alternates are impaneled. H.R. 851 would also have amended section 3592 to discourage the dismissal of alternate jurors in capital cases until sentencing has been completed. Other proposals, notably H.R. 3156 and S. 1860, would have left the number of jurors and alternates as is and merely directed the court to retain alternates until sentencing has been completed. Existing law permits a capital jury to unanimously recommend a sentence of death or life imprisonment without the possibility of release; if they do not, the court is to sentence the defendant to any lesser sentence authorized by law, i.e., imprisonment for life or for a term of years.

## **New Federal Capital Offenses**

S. 607 would have outlawed interference with federal disaster relief efforts; when death results from a violation of the proscription, the defendant may be sentenced to death or life imprisonment. H.R. 3806 would have made sabotage of nuclear facility a capital offense if a death resulted from commission of the offense. The bills drafted to counter gang violence—e.g., H.R. 3150 and H.R. 880—frequently included two new federal death penalty offenses. One would have proscribed the use of interstate facilities with the intent to commit multiple murders and is a capital offense if death resulted. The second, modeled after the provision that condemned the use of a firearm during or in relation to a crime of violence or a drug offense, would have outlawed crimes of violence committed during or in relation to a drug trafficking offense and would have made the offense punishable by death if a death resulted. The murder committed during and in relation to a drug trafficking offense appears as a capital offense in other bills as well (H.R. 1118, H.R. 3156, and S. 1860); as does the new capital multiple murder proposal (H.R. 3156 and S. 1860). In addition, H.R. 3150 would have condemned murder along with other violent crimes in furtherance or in aid of a criminal street gang, an offense it would have made punishable by death. Existing law proscribes overseas murder and assault committed against Americans by terrorists. H.R. 2376, H.R. 3147, H.R. 3156, S. 1320, and S. 1860 would have proscribed overseas kidnapping of Americans by terrorists and proposed the death penalty as a sentencing option if a death resulted. Several of the immigration bills—e.g., H.R. 1645, S. 330, and S. 1348—would have proscribed evasion of border inspection and made the offense



punishable by death, imprisonment for any term of years, or for life if death resulted. Rather than amend existing non-capital federal terrorist offenses to make them capital offenses when they result in a death, H.R. 855, H.R. 3156, and S. 1860 would have created a new separate federal offense which would have outlawed the commission of, or attempt or conspiracy to commit various federal terrorist offenses when a death resulted. Violations would have been punishable by death or imprisonment for any term of years or for life. Its impact might have been less dramatic than might appear, since many of its predicate offenses are already capital crimes or would have been elevated to capital offenses elsewhere in the bills. Nevertheless, as a consequence the following crimes would have become capital offenses if a death occurred during the course of their commission.

### **Capital Punishment for Existing Non-Capital Offenses**

H.R. 855, H.R. 3156, H.R. 3147, and S. 1860 would have established the death penalty as a sentencing option when death results as a consequence of a violation of: 18 U.S.C. 832 (participation in foreign programs involving weapons of mass destruction), 2332g (anti-aircraft missile offenses), 2332h (radiological dispersal device offenses), 175c (variola virus (small pox) offenses); and 42 U.S.C. 2272 (atomic weapons offenses). The gang bills would have rewritten the federal criminal gang statute to permit imposition of capital punishment for a death-resulting violation of the newly crafted provisions, H.R. 880 and H.R. 3150. H.R. 3156 and S. 1860 made the same proposal. The Travel Act, among other things, outlaws interstate travel to commit a crime of violence in furtherance of various drug, gambling, or extortion offenses. H.R. 3156 and S. 1860 would have permitted imposition of the death penalty if a violation resulted in death.

### **Abolition of Capital Punishment**

S. 447/H.R. 6875 would have eliminated the death penalty as a sentencing option for federal and military capital offenses. It would have prohibited imposition of the death penalty and provided that prisoners under sentence of death at the time of enactment shall be sentenced to life imprisonment without the possibility of release. It would have repealed the federal procedures for implementation of the death penalty. It would have dropped 18 U.S.C. 3235 which dictates that the trial of a capital offense be conducted in the county in which it occurred. It would have amended the statute of limitations to list specific previous capital offenses which may be tried at any time. It would have made comparable adjustments in the Code of Military Justice.

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